

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

DEC 14 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Wireless Telecommunications Bureau Seeks)
Comment on Petition for Declaratory Ruling)
Concerning the Requirement for Good Faith)
Negotiations Among Economic Area Licensees)
And Incumbent Licensees in the Upper 200)
Channels of the 800 MHz Band)

PR Docket No. 93-144


To: William W. Kunze, Chief
Commercial Wireless Division

**COMMENTS OF THE
AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.**

Respectfully submitted,

AMERICAN MOBILE TELECOMMUNICATIONS
ASSOCIATION, INC.

By:


Alan R. Shark, President
1150 18th Street, N.W., Suite 250
Washington, D.C. 20036

Of Counsel:

Elizabeth R. Sachs, Esq.
Lukas, Nace, Gutierrez & Sachs, Chartered
1111 19th Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 857-3500

No. of Copies rec'd
List ABCDE

04/0

December 14, 2000

The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association") respectfully submits its comments in response to the Federal Communications Commission ("FCC" or "Commission") November 29, 2000 *Public Notice* regarding the Nextel Communications, Inc. ("Nextel") Request for a Declaratory Ruling in respect to the good faith negotiation requirements set out in FCC Rule Section 90.699 ("Request").¹ As described in the Public Notice, Nextel has indicated that certain of its subsidiaries that are Economic Area (EA) licensees in the upper 200 MHz channels and are conducting relocation negotiations with incumbent licensees on these channels have been unable to obtain technical data from a limited number of incumbents that Nextel deems essential to permit EA licensees to make offers of comparable facilities.

I. INTRODUCTION.

1. Nextel has asked that the FCC issue a declaratory ruling affirming that an incumbent who fails to provide the technical data outlined in the Request is deemed to have breached its obligation to negotiate in good faith for purposes of permitting the EA licensees to develop a good faith relocation proposal. Alternatively, the *Public Notice* states Nextel has requested the FCC to declare that EA licensees have satisfied their own good faith negotiations when, in the absence of such data, they propose a relocation plan based on publicly available information about the station. Nextel also has urged the Commission to initiate a proceeding to revoke an incumbent's license if the incumbent fails to provide basic system-specific technical data when requested to do so by an EA licensee. Finally, the *Public Notice* indicates Nextel has

¹*Public Notice*, Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling Concerning the Requirement for Good Faith Negotiations Among Economic Area Licensees and Incumbent Licensees in the Upper 200 Channels of the 800 MHz Band, DA 00-2694 (rel. Nov. 29, 2000) ("*Public Notice*").

requested, at a minimum, that "an incumbent's failure to provide technical data needed to develop a relocation plan should create a strong presumption that a plan developed by the EA licensee based only on publicly available information meets the four-factor comparability test" pursuant to FCC Rule Section 90.699(d). ²

II. DISCUSSION.

2. AMTA agrees that the Commission has an obligation to ensure that the 800 MHz relocation process it adopted proceed as transparently and expeditiously as possible, consistent with the rights and obligations of incumbents and EA licensees set out in Section 90.699 of the Commission's Rules. Based on input the Association has received from members who are upper 200 channel incumbents and Nextel's previous public statements regarding the progress it has made in effectuating relocations, it appears that negotiations among the parties are proceeding without significant difficulty. The Commission's recent decision to grant Nextel's request to extend the negotiation period from December 4, 2000 to March 5, 2001 presumably will permit at least some additional incumbents to reach satisfactory relocation agreements with Nextel or any other EA licensees.³ AMTA is pleased that the process has proceeded as smoothly as it has, particularly in light of the strong opposition to incumbent relocation from many industry participants.

²*Public Notice* at p. 2.

³*Public Notice*, Wireless Telecommunications Bureau Extends Mandatory Negotiation Period for the Relocation of Incumbent Licensees in the 800 MHz Band Until March 5, 2001, DA 00-2672 (rel. Nov. 27, 2000).

3. Nextel's assertion that it is not able to prepare system-specific relocation proposals for a small number of remaining incumbents because they have refused to provide any non-public technical information about their existing operations on its face appears reasonable. No operator is eager to share system information with another party, particularly a competitor such as Nextel, but the majority of retuned incumbents apparently have provided sufficient detail to permit the development of an acceptable proposal, to date without obvious, adverse effect. The Association anticipates that the failure to provide the requisite information will be a factor, likely a highly significant factor, in the resolution of those, hopefully very few, instances in which EA licensees and incumbents are unable to complete even an involuntary relocation without arbitration or adjudication. To the extent an incumbent is unable to explain its refusal to provide that information to the satisfaction of the party reviewing the matter, the incumbent presumably will be found not to have negotiated in good faith as required by the FCC's rules. Moreover, before acting on the Request, AMTA is confident the FCC will take appropriate steps to assure itself that there is no reasonable basis for an incumbent to withhold the information sought by Nextel, thereby ensuring that its decision is based on a full understanding of the facts and circumstances surrounding the relocation process.

4. The Association also urges the Commission to take this opportunity to act on AMTA's long-standing Petition for Reconsideration regarding the issue of incumbent progress payment rights.⁴ The FCC has not yet acted on that Petition almost a full year after its submission and less than ninety days before termination of the recently-extended negotiation

⁴AMTA, *Petition for Reconsideration*, PR Docket No. 93-144, filed January 19, 2000.

period for upper 200 relocation agreements despite the Association's repeated requests for expedited action in light of the impending initiation of non-negotiated relocation processes.⁵

5. The basis for AMTA's Petition is undisputed: the Commission's conclusion that it had previously determined **not** to provide for progress payments to incumbents undertaking the retuning process was based on the agency's misreading of its own previous decisions. The rule cited to support that proposition does not address the issue of progress payments from EA licensees to incumbents; it related exclusively to progress payments **among** EA licensees who were benefitted by the relocation of a single incumbent. The Commission still has not addressed the question of whether incumbents whose systems are being retuned to other frequencies for the benefit of an EA licensee should not be obligated to pay the entire cost of retuning and wait to be reimbursed by the EA winner, but rather to receive progress payments during the process to defray what can be not insignificant out-of-pocket expenses on an ongoing basis.

6. Nextel repeatedly has opposed the Association's Petition. It has argued, first, that the Commission was correct in stating that it had addressed this issue previously and decided in favor of the EA licensees. Yet, Nextel, like the FCC, has failed to cite to a single statement or rule in any previous order in this proceeding to support that assertion.

7. However, the crux of Nextel's argument is that no regulatory action is necessary because the issue of progress payments should be left to negotiation between the parties. This misses the point entirely, although the Association hopes not deliberately. Parties could negotiate for progress payments **when the relocation process still was in the voluntary and mandatory**

⁵See, AMTA *ex parte* filings dated August 8, 2000 and September 29, 2000.

negotiation period. As of March 5, 2001, incumbents who have not reached a negotiated agreement with Nextel will no longer be in a position to negotiate with them – for progress payments or anything else. At that point, the FCC’s involuntary relocation procedures will become effective which specifically do not provide for negotiation between the parties. An incumbent whose system is relocated under those rules will not have an opportunity to demand progress payments from Nextel and there is no reason to assume Nextel would be inclined to provide them voluntarily.

8. AMTA believes that denying progress payment rights to incumbents under those circumstances constitutes a punitive action on the part of the FCC. Unless a particular incumbent is determined not to have negotiated in good faith, it simply is unfair to require them to advance the monies needed to clear their channels for the exclusive benefit of EA licensees, and then leave them to wait for reimbursement from that licensee. The Association believes that, like the parties about whom Nextel is concerned in the instant Request, it will be a very small number of incumbents for whom progress payment relief will be important, but as with Nextel’s concern, the issue will be of substantial significance to the affected parties.

III. CONCLUSION

9. For the reasons described above, AMTA urges the Commission to proceed expeditiously to adopt rules consistent with the Association’s comments.

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this December 14, 2000 caused to be mailed, first-class, postage prepaid a copy of the foregoing Comments to the following:

Chairman William E. Kennard
Federal Communications Commission
445 12th St., S.W., Rm. 8-B201
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
445 12th St., S.W., Rm. 8-B115
Washington, D.C. 20554

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
445 12th St., S.W., Rm. 8-A302
Washington, D.C. 20554

Commissioner Michael Powell
Federal Communications Commission
445 12th St., S.W., Rm. 8-A204
Washington, D.C. 20554

Commissioner Gloria Tristani
Federal Communications Commission
445 12th St., S.W., Rm. 8-C302
Washington, D.C. 20554

Thomas Sugrue, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., S.W., Rm. 3-C207
Washington, D.C. 20554

Kathleen O'Brien-Ham, Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., S.W., Rm. 3-C207
Washington, D.C. 20554

James D. Schlichting, Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., S.W., Rm. 3-C207
Washington, D.C. 20554

William W. Kunze, Chief
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., S.W., Rm. 4-C207
Washington, D.C. 20554

Jeffery Steinburg, Deputy Chief
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., S.W., Rm. 4-C207
Washington, D.C. 20554

Paul D'Ari, Chief
Policy and Rules Branch
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., S.W., Rm. 4A-207
Washington, D.C. 20554

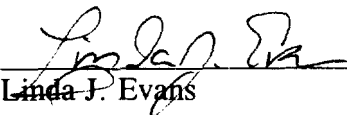
Suzan Friedman, Deputy Chief
Policy and Rules Branch
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., S.W., Rm. 4A-207
Washington, D.C. 20554

Richard Arsenault
Policy and Rules Branch
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., S.W., Rm. 4A-267
Washington, D.C. 20554

Nextel Communications, Inc.
Robert S. Foosaner, Senior Vice President
and Chief Regulatory Officer
Lawrence R. Krevor, Senior Director -
Government Affairs
James B. Goldstein,
Attorney - Government Affairs
2001 Edmund Halley Drive
Reston, VA 20191

Public Reference Room
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

International Transcription Services, Inc.
445 12th St., S.W., Rm. CYB-400
Washington, D.C. 20554


Linda J. Evans